SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS

RESPONSE OF G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS, TO AMENDED PETITION FOR WRIT OF CERTIORARI.

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The respondent respectfully represents and shows to the Court:

I

Objections to Sufficiency of Amended Petition for Writ of Certiorari

1. The amended petition does not conform to the requirements of Rule 38 of this Court:

(a) In that said Rule has not been complied with as set forth in response to original petition under paragraphs

1(a), (b), (c) and (d), which parts of original response are here adopted.

(b) There has been failure to comply with Rule 38(2) and (3), in that the permission for filing the amended petition was allegedly obtained on September 5th, 1947, and the said amended petition was not filed within the time contemplated under the rule before or after the Court convened.

2. The amended petition and brief thereto were not mailed to the Clerk of this Court until November 12th, 1947, which was long after the permission was allegedly granted; and the petitioner and/or attorneys gave no notice to respondent or his attorneys of the application for such permission either before or after the alleged grant thereof, and the first notice to the trustee or attorneys for the trustee was obtained through copy of letter of the Honorable Horace C. Wilkinson to the Honorable Charles Elmore Cropley, Clerk of this Court, dated November 12th, 1947; and this conduct violates the rules of this Court and a proper interpretation thereof, and the amended petition and brief should not be considered by the Court, and the original application should be denied.

II

Response to Amended Petition for Writ of Certiorari

The arrangement of amended petition differs with original petition, and attorney preparing amended petition seeks to identify the three volumes of bankruptcy record proper by the letters "B. R.", and this cause by the letters "E. R." for Edmonson Record, and this is contrary to our plan in response to original petition, and we shall adhere thereto by making reference to the record created and partially printed in this cause in two volumes by the letters "R. R.",

and we shall conform to our previous handling and the handling by petitioner in referring to the three bankruptcy volumes by the letters "B. R."

"SUMMARY STATEMENT OF MATTER INVOLVED"

Under the last above identified heading, it is stated that the case involves the validity of three written contracts made by F. T. Newton with Mr. and Mrs. John B. Edmonson, and the validity of two deeds of Newton to Mrs. Edmonson, dated August 23, 1943, in settlement of Newton's liability under the contracts. The facts are that there were three papers signed with F. T. Newton on one side and Mr. and Mrs. Edmonson and others of the Newton family on the other, as related to three Federal wartime contracts, but there were three deeds instead of two covering all of the real estate owned by Mrs. Newton, sister of Mrs. John B. Edmonson, named grantee, and by Mr. Newton, with two deeds covering the same identical property executed by Mr. F. T. Newton to Mrs. John B. Edmonson (R. R. 102-130). There is nothing in either deed to show that same was given in settlement of Newton's liability. The named consideration in each deed is "Ten ($10.00) Dollars and other good and valuable considerations." The Federal Revenue stamps on the F. T. Newton deeds are three in number, aggregating $11.00, and the revenue stamps on the deed of Mrs. Ethel Flurry Newton, being the same as Mrs. F. T. Newton, aggregate $9.90. If the consideration was intended to include the $104,099.58, now claimed to have been included, in addition to the alleged assumption of incumbrances of approximately $85,000.00 against the said properties, the revenue stamps do not reveal this, and as is well known to the opposition, there is not one single record of the conveyances or of the alleged obligations growing out of the three alleged contracts. All was had

and done by word of mouth without a single scratch of the pen, to permit the strained and forced interpretation now wanted so much by these parties.

The Honorable Horace C. Wilkinson, who has apparently prepared the amended petition for writ of certiorari, is not familiar with the facts and the record, as is disclosed by his statement that there was incorporated in this cause before the trial court the three volumes of transcript of record in Case Number 11,306 in the United States Circuit Court of Appeals for the Fifth Circuit, being the case where the Newtons were adjudged bankrupts, 149 F. (2d) 879, certiorari denied in this Court, 326 U. S. 758. There was included all of the testimony in said bankruptcy cause, and substantial parts thereof were eliminated from the printed record, now appearing in three bound volumes.

It is stated under this heading that the Edmonsons are out $104,099.58 because of the fact that the United States Circuit Court of Appeals for the Fifth Circuit reversed the district court and remanded the cause, with directions to set aside the transfers and to deny the claim of the Edmonsons. In truth, the Edmonsons are out nothing. The first of the three alleged contracts identifies the Edmonsons as two of "six silent partners" (R. R. 216-219). The second of these contracts was prepared to be signed by the same six parties, and referred to them as "six silent partners," but in truth only Edmonson and his wife signed, and the same is not acknowledged or recorded, and evidently was signed after the default with the Government (R. R. 221-224). The third contract again refers to the Edmonsons as silent partners, and there is no acknowledgment and no recordation. These are the writings to which petitioner refers in the amended petition.

The statement is made that Mr. and Mrs. Edmonson's share of the proceeds on the three jobs was $104,099.58. Reference is first made to the audit of R. G. Wooten, repre-

sentative of the Newtons and the Edmonsons, as it appears at page 1174 of the bankruptcy record. That audit covers records of accounts in the office of F. T. Newton for the year ending December 31, 1942 covering the three contracts; and at that time these three jobs were not completed. Reference is also made to the decree of the court as it appears at page 933 of the receivership record bearing Cause Number 11,905 in the Circuit Court of Appeals. The district judge had no proof to show the amount of proceeds on the three jobs, if there were proceeds. The district judge did have before him the audit made for the Newtons by Dumaine, auditor of New Orleans, Louisiana, which did not take into consideration $600,000.00 to subcontractors, and in connection with said audit made to cover status of the Newtons as of August 31, 1943, Dumaine recognized that the books and records of the Newtons did not disclose the status of the business (B. R. 1361); and that the books showed that Newton had $150,000.00 in a Memphis Bank at a time when he was overdrawn $50,000.00 (B. R. 1365), and Dumaine was unable to use any of the Newton books and only some of the records (B. R. 1363), and the Arkansas Trust Company Bank account of Newton's books showed $100,000.00 more than there was in the bank, and the records against the National Bank and Trust Company at Pine Bluff, Arkansas showed a balance of $150,000.00, when in fact there was only $15,000.00 on deposit (B. R. 1368), and Dumaine admitted that the books were out of balance on bank accounts alone nearly $1,000,000.00 (B. R. 1377), and Dumaine had no knowledge of the $600,000.00 to subcontractors (B. R. 1377), and Dumaine valued Newton's real estate at $25,000.00 when there were no book records of this and F. T. Newton gave him the figure (B. R. 1407), and the audit showed taxes amounting to $35,395.00, when in fact there were Federal taxes alone in excess of $225,000.00. The witness did not take into account any claims of T. E.

Newton, Phillip Newton, Carol Newton, Reuben L. Newton and Mr. and Mrs. John B. Edmonson under contracts or otherwise, because their names did not appear on the books and records of Newton and the auditor never heard of such claims (B. R. 1417). He knew nothing about the bond transactions wherein the Newtons and Edmonsons cashed in and ridded themselves of all the bonds they held (B. R. 1418). These facts are evidently not known to the Honorable Horace C. Wilkinson, preparer of the amended petition and brief.

Reference is made to the finding of the district judge with respect to the interest of the Edmonsons; but the district judge failed to recognize the facts about related, and which facts were presented to the Circuit Court of Appeals out of the record itself, for their consideration and determination of the rights of the parties. It should be stated that the same district judge in the bankruptcy cause held that a court can reach no other conclusion than that the conveyances were made "to hinder and delay creditors in the collection of their debts and the law thereupon presumes that they were fraudulent" (B. R. 1655-1658). On appeal, the Honorable Edwin R. Holmes for the Circuit Court of Appeals held that the bankrupts were guilty of conveying their property and concealing same "with intent to hinder, delay and defraud their creditors." *Newton, et al.*, v. *Glenn, et al.*, 149 F. (2d) 879.

The question arises as to the knowledge of the Edmonsons prior to August 23, 1943, the changed date on the deeds. Edmonson stated that the Newton books "were in a mess" (R. R. 486), and Edmonson "was disturbed about it" (R. R. 487), and Edmonson "took what was offered" because he "didn't know just where he was at" (R. R. 488), and the Edmonsons were inquiring about Newton's solvency "for the simple reason that we would like to know his financial condition" (R. R. 491). And before the Edmon-

sons ever negotiated for the deeds, he could not know whether Newton was solvent or insolvent, "I could not tell. I hadn't been able to find that out," and he did not know if Newton could pay his debts as they matured (R. R. 492), and with these facts, the Edmonsons took all they could get from the Newtons (R. R. 493). After the deeds were delivered, Edmonson did not know if his wife received any of the rent monies (R. R. 497-8), and he never heard any rent money mentioned by his wife, and the Newtons continued to occupy the office space in building conveyed in one of the deeds (R. R. 498-9), and the record is full of these kinds of admissions on behalf of the Edmonsons, with no stronger proof on their part. They must have known of the condition of the Newtons when the deeds were delivered. They, at least, knew enough to charge them with notice thereof. Mrs. Edmonson appeared before the referee in bankruptcy, and most of her answers were to the effect that she did not remember, and she remembered so little that the referee in bankruptcy finally said to her: "You can give the court some idea what you got in some months. There is no rhyme, reason or excuse for your answering 'I don't know' to every question. You must give the court the benefit of what you know, within limits, and you do know something" (R. R. 881). It is under this kind of record that the Edmonsons are trying to get this Court to consider paying to the Edmonsons more than $104,000.00 on the scheme outlined for the Edmonsons by the Newtons and Edmonsons and their attorneys, and this is being called for at a time when there are unpaid probated claims of $2,387,491.32 against the estate, with probated Federal tax claim of $225,643.34 (R. R. 823), and less than $100,000.00 to use in the payment thereof if the Newtons and Edmonsons prevail in this litigation.

"Questions Presented"

Respondent denies that the Edmonsons had a claim for $104,000.00, and denies that the three contracts were supported by lawful considerations, and denies that the deeds were supported by valid considerations, and denies that the Newtons did not owe the Memphis Bank as claimed, and denies the bona fides of the transaction insofar as Mrs. Edmonson or her husband were concerned, and denies that either Mr. or Mrs. Edmonson is entitled to any relief whatsoever.

"Reasons Relied on for Allowance of Writ"

Respondent claims and contends that the existing facts do not permit application of principles appearing in case of *Burnet* v. *Leininger*, 285 U. S. 136, and respondent claims and contends that the United States Circuit Court of Appeals was eminently correct under the facts, and that the case of *Storm* v. *U. S.*, 94 U. S. 76, has no application; and respondent denies that there was a decision of a federal question by the United States Circuit Court of Appeals for the Fifth Circuit, in this cause, which in any way conflicts with applicable decisions of this Court, as is disclosed by the record; and respondent denies that said court of appeals departed from usual course of judicial proceedings when it set aside the judgment of the district court, and as will be hereinafter set forth, the said court of appeals had no election but to enter the opinion and order as entered; and respondent denies that Section 107 (d) of the Bankruptcy Act has any application whatsoever to the facts of this cause, and respondent denies that the petition has any foundation in law or fact, and he prays that the petition be denied.

III

ARGUMENT FOR RESPONDENT

Edmonsons Had No Valid Claim under Contracts

Under the first proposition of petitioner in amended petition, it is claimed that the Edmonsons were claiming under three valid contracts, and in support thereof it is pointed out that these contracts may be considered either equitable assignments, or subpartnership agreements, or agreements covering joint adventure. We fully appreciate that there could have been an equitable assignment, or a subpartnership agreement, or a joint adventure, but we first claim, as the Circuit Court of Appeals held, that there was no consideration for these contracts, and that they were entered into with view of avoiding the payment of taxes, and that same were mere subterfuges and fraudulent and void. There is ample of uncontradicted testimony in the long record to justify this conclusion; and in this connection, it must be pointed out that Mrs. Edmonson, who is the petitioner here, never gave any testimony to support the claims now being made by the attorneys that there was a good faith transaction. It should be pointed out that the partnership of Newton & Glenn consisted of F. T. Newton, Mrs. F. T. Newton and F. S. Glenn, and this was the conclusion reached by the trial judge and by the United States Circuit Court of Appeals in the bankruptcy cause, reported in 149 F. 2d, page 879, and against which certiorari was denied by this Court, and record thereof appears in Volume 327, U. S. Reports, page 758. The Mrs. John B. Edmonson now seeking to hold most of the property of the bankrupts against the trustee is a sister of Mrs. F. T. Newton, and Mr. and Mrs. Edmonson and Mr. and Mrs. Newton have been working together with view of trying to defeat the trustee in assembling assets for the creditors. In the

opinion of the United States District Judge in this very cause it was stated that "These sub-contracts were made undoubtedly for the purpose of diminishing the income tax of Newton, which under the law at that time was permitted" (R. R. 925). As the Circuit Court of Appeals held, these so-called sub-partnership contracts were without consideration and void; and the court on appeal recognized that there was no proof to show profits on the particular contracts because the R. G. Wooten audit only included period to December 31, 1942, and these Government projects were only ninety-five per cent complete on August 15, 1943, when said audit was dated. The discussion about sub-partnership rights, therefore, has no place in this record, because of absence of proof to support same.

There existed no community of interests between the Newtons and the Edmonsons. F. T. Newton reserved to himself control over the business. There did not exist any mutual agency, and as before stated, the trial judge held that the arrangement was entered into with view of avoiding taxes. The Supreme Court of Mississippi has held in the case of *Cudahy Packing Co.* v. *Hibou,* 92 Miss. 234, 46 So. 73, that the contracting for a share of profits does not constitute a partnership, if the parties do not intend a community of interest. A similar position is indicated in text of 47 C. J., 669-70. The second phase of this first contention of petitioner is that the three contracts were each supported by a valid, lawful consideration. No one would argue against statement that mutual promises existing between contracting parties, when performed by one, would be sufficient to require an enforcement for performance by the other; but that is not the state of facts here. In the first place, the contracts falsely stated that Newton and Glenn was composed of F. T. Newton and F. S. Glenn. In the second place, the alleged contract states that it was necessary for F. T. Newton to acquire additional capital,

but the proof shows, as admitted by petitioner, that there was no sharing of capital, and in addition thereto it is provided that:

> ". . . F. T. Newton is to conduct and manage the construction and carrying out of said contract in accordance with his own judgment of the same and that the said F. T. Newton shall have full power to control said construction in every particular and it is hereby agreed that the power of attorney for and on the part of each of the above two parties is hereby invested in the said F. T. Newton to execute full determination and control of said construction provided for in said contract. . . ."

It is further provided that said parties are "silent partners" (R. R. 226). In other words, the parties themselves contracted against creditors having knowledge of the existence of such contracts, and there are now more than $2,000,000.00 of claims probated against the estate of the two bankrupts, and petitioner is trying to take away the real estate valued at $450,000.00 for her own benefit, under this secret arrangement made to avoid Federal taxes, to the exclusion of the creditors who had no knowledge of the contract, and who would never know about the same under the terms and provisions thereof.

There is further discussed the question of consideration for the said contracts. We have already mentioned that nothing was furnished towards the construction of the three Federal projects identified in the three alleged contracts. Even petitioner now admits before this Court that the money was to be furnished by the Memphis Bank, and she contends that the Memphis Bank had no election but to furnish the money irrespective of the method and manner of the carrying on of the work for the Government by Newton. It is unusual that the books and records of Newton carried no reference to the alleged contracts. The auditors examining

the books, including Dumaine, employed for the Newtons and Edmonsons, found nothing of record about these writings. Mrs. Edmonson, who is petitioner here, put no money in the three contracts, and she put no work on either of the three jobs (R. R. 836); and there was no money passed, or interest of any kind passed when the contracts were signed (R. R. 837); and Mrs. Edmonson made no contribution whatever to the three jobs, either of money or property (R. R. 836). She did not even know that the jobs were begun in 1942, but she identified 1943 as the beginning of the contracts (R. R. 839). She knew nothing about the profits and losses on the separate jobs (R. R. 842). She did not know if there was anything in the contracts to provide that she would share in the losses, and if there was any such provision she knew nothing about it (R. R. 844). The law cited by petitioner is good law, but it does not fit the facts of this case, and has no application here.

Newton Did Owe the Memphis Bank Approximately $1,500,000 at the Time the Deeds Were Executed and Delivered to Mrs. Edmonson.

Under the above heading, stated in reverse, there is contained petitioner's "Proposition II." The trial court and the circuit court of appeals have recognized that the Union Planters National Bank and Trust Company had a claim against the Newtons for approximately $1,500,000.00. The testimony in the first receivership trial which resulted in appointment of receiver to take over the very property here involved, discloses the indebtedness due to said Memphis Bank of $1,531,171.89 (R. R. 139). This was never disputed by the bankrupts or Mrs. Edmonson, and on page 148 of the original receivership record, being volume one of printed record of said United States Circuit Court of Appeals No. 11,905, there are identified, item by item,

the notes payable to make up this sum, and incidentally, it is there shown that as of October 13, 1943, just one week after the deeds in question were recorded and became effective as to creditors, there was still due to said Memphis Bank for unpaid notes of Newton & Glenn the sum of $79,765.95 (R. R. 148). It is claimed by petitioner that letter of July 24, 1943 bound the Union Planters National Bank and Trust Company to furnish money to extent of $1,500,000.00. The question arises as to whether or not the Memphis Bank had a right to refuse to make payroll advance of $225,000.00 to F. T. Newton on Brunswick, Georgia Federal Project on October 16, 1943, after it had developed that the Newtons had conveyed away all of the real estate which they owned, and valued at $451,100.00, with furnishings therein valued at $30,000.00.

To understand the attitude of the trustee and his attorneys in connection with any claim against said bank, it should be pointed out that the United States District Court, prior to the filing of the amended petition and brief affected hereby, in a hearing participated in by the Honorable Horace C. Wilkinson, held that the bankrupts, and/or the trustee had no claim against the Union Planters National Bank and Trust Company. Before the said district judge and before this Court is the entire bankruptcy record, and a part of which appears in three bound volumes as aforesaid.

The only basis of Newton for claim against the Memphis Bank has to do with letter of July 24, 1943, affecting line of credit, which letter provides that a line of credit of $1,500,000.00 has been set up "subject to usual credit reservations and to the acceptance of the assignment of the contract by all necessary parties and the consent of the Bonding Company" (B. R. 659). The assignment used for Newton & Glenn prior to March 1, 1943, and for F. T. Newton, General Contractor, after said date, was on the

same general form, and the assignment in itself recognizes the right of the bank to lend or not to lend as it saw fit, as disclosed through one paragraph that:

> "This assignment is made for the purpose of securing payment to the Union Planters National Bank & Trust Company, Memphis, Tennessee, of such sums as said bank may elect from time to time to lend to the assignor to enable it to go forward with and perform said contract." (B. R. 315.)

In other words, the duty of the bank to lend was subject to the usual credit reservations and subject to its own judgment in connection therewith, as identified in each separate assignment on the several Federal Projects. In spite of this fact, the preparer of the amended petition affected hereby, because of his failure to have full knowledge of the facts as disclosed in the record, is contending that the Circuit Court of Appeals is in error. He says that it is inappropriate for the Circuit Court of Appeals to identify the debt at $1,500,000.00 as of August, 1943, and he seems to want to contend that the debt to said bank in August of 1943 ought to be identified as $1,360,003.93, as fixed in the Dumaine audit prepared by said Dumaine for the Newtons and used in the bankruptcy trial (B. R. 1228), but the indebtedness of principal and interest actually aggregated more than $1,500,000.00 when principal and accrued interest were added together (B. R. 1755). Said attorney is also confused about there being a suit against the Memphis Bank. There is no such suit in existence, and the district court has held that under the aforementioned assignment and letter, and based upon the bankruptcy record, the trustee has no claim against said bank. This is known to Mr. Wilkinson, who has participated in a hearing in this regard.

Substantial of space is used by petitioner to try to show that the $1,500,000.00 item ought to be divided into

three parts, so that the First National Bank of Atlanta and the American National Bank of Nashville would be identified as claimants. This is again evidence of a failure of understanding of the facts by Mr. Wilkinson. All notes were executed by the Newtons or Newton & Glenn, in favor of the Union Planters National Bank & Trust Company of Memphis, Tennessee. The Nashville bank and the Atlanta bank only participated with the Memphis bank in the handling of the monies, but all of the money actually cleared through the said Memphis Bank, and constituted part of the debt of the Newtons. It is true that the Union Planters National Bank & Trust Company only probated claim of $1,100,422.91, and the National Surety Corporation only probated claim for $663,678.83, and the Maryland Casualty Company only probated claim for $260,082.50 (R. R. 821); but the United States of America paid unpaid balances on Government contracts to the surety companies and banks on some kind of arrangement. The probated claim itself of the bank, which is a part of this total record, shows the details of the participation by the Atlanta and Nashville banks. This mistake in argument would not have been made by the Honorable T. J. Wills, of attorneys for the Newtons and Edmonsons, because of the fact that he understood and knew of these parts of the record.

After all, this question of the size of the bank's claim has nothing to do with the controversy here. This question of the bank's claim was not in issue. There is nothing in the pleadings and nothing in the proof which was before the trial judge or before the Circuit Court of Appeals to bring into play the discussion here presented in amended petition by the Honorable Horace C. Wilkinson. We have only referred thereto, as we are referring to a number of other matters not in issue, simply because of Mr. Wilkinson's reference to same, and this in spite of the fact that

same are not germane to the issue, and have no place in a petition for certiorari in this cause.

Some reference is made under Proposition II d of amended petition to a claimed oral understanding had by the Newtons and the Memphis Bank with reference to the advancement of monies. This really has no place in the record, but the so-called letter of credit dated July 24, 1943, from said bank to Newton (B. R. 659), plus the assignment (B. R. 315), constitute the basis for the contentions of Newton. It was Mr. Newton's testimony that the bank loaned him money against assignments (B. R. 657), and Newton further stated that he had an agreement, and we called for the agreement, and then this question was asked of Newton: "Is that what you are talking about—that is the agreement you had with the bank?" and his answer was "Yes sir" (B. R. 658); and the letter was introduced as Exhibit 39 to plaintiff's record, and it appears in the bankruptcy printed record at pages 659 and 660. Every single advance or loan made by the Memphis Bank, either to Newton & Glenn or to F. T. Newton General Contractor, was evidenced by a separate note, and a general statement of all of these advances, showing credits on the several Federal jobs identified, discloses that the total debt due said Bank by Newton and Glenn and F. T. Newton, as of August 15, 1943, was $1,878,003.14 (R. R. 810). By September 15, 1943, the debt had been reduced to a little more than $1,600,000.00, and by October 16, 1943, the debt had been reduced to a little more than $1,500,000.00. As of the date of the Wooten audit of August 15, 1943, Newton & Glenn, affected by the three alleged contracts, owed the Memphis Bank $285,405.07. However, the Wooten audit, relied on by petitioner, did not take into account this figure, because it only covered period ending with December 31, 1942, as hereinbefore set forth.

It is unusual that the opposition here is claiming that the Memphis Bank owed Newton more than $2,000,000.00, when in fact, Newton and his wife are insolvent and are bankrupts, and have claims of more than $2,300,000.00 probated against them; and the property they owned, and which should be used to pay said debts, is involved in this litigation growing out of a flimsy concoction planned, as was held by the district court as aforesaid, to avoid income taxes. Reference is made to the letter of May 31, 1944 to the Memphis Bank by Newton, and prepared under the supervision of his lawyer, and which in truth is child play in disguise (B. R. 1528).

Mrs. Edmonson Did Intend to Defraud Creditors of Newton on August 23, 1943

Under this third proposition in argument, where the attorney is seeking to wash clean the hands of Mrs. Edmonson of the fraud of the creditors, he is overlooking the record when he asserts that the agreements with the blood relatives of the Newtons and the agreements with the blood relatives of the Glenns were identical, in that both Newton and Glenn were attempting to minimize the amount of income taxes, and were using this subterfuge to reduce their income taxes; and he is mistaken when he says that nothing in the record can be twisted or distorted into an intimation that the Edmonsons knew that Newton was expecting to encounter economic difficulties. There are so many circumstances to require a different conclusion. These contracts were not executed by Mrs. Newton. She owned more than half of the real estate, and she gave away her real estate to her sister, just as her husband gave his real estate to her sister, at a time when Newton was wholly insolvent, and at a time when Newton purposely made these transactions along with his wife to hinder, delay and defraud their creditors. All of the argument of petitioner about the good faith

of Newton is out, because the entire bankruptcy record is before the court, and the trial court and the Circuit Court of Appeals held in the bankruptcy suit that Mr. and Mrs. Newton were guilty of making these conveyances to hinder, delay and defraud their creditors. The trial judge had made this finding, and the Circuit Court of Appeals for the Fifth Circuit reexamined the record now before this Court and came to the same conclusion. 149 F. (2d) 879. The bankrupts filed petition for writ of certiorari before this court, and which petition was denied, 326 U. S. 758; and there was presented to this Court in that case a number of decisions respecting the "two-court rule" followed here. The "two-court rule" and the adjudications had against the bankrupts cannot permit of claims by Mrs. Edmonson that Mr. and Mrs. Newton were other than defrauders of their creditors.

> "The two courts below are in agreement as to the inferences fairly to be gathered from the facts, and their findings are not to be disturbed unless clearly erroneous." *United States of America* v. *Commercial Credit Company*, 76 L. Ed. 978, 268 U. S. 63.

See also *Alexander, Administratrix, et al.*, v. *Spencer Kellogg & Sons, Inc.*, 76 L. Ed. 903, 285 U. S. 502, 510; *Goodyear Tire & Rubber Company, Inc.* v. *Ray-O-Vac Company*, 88 L. Ed. 721, 321 U. S. 275, 278; and *Anderson* v. *Abbot, et al.*, 88 L. Ed. 793, 321 U. S. 349, 356.

Since there has been the final adjudication against the Newtons that they are guilty of defrauding their creditors, and the conduct of Mr. and Mrs. John B. Edmonson in dealing with these defrauding bankrupts must be looked upon with suspicion, they have the burden to show that the Edmonsons, too, were guiltless, and as already stated, their testimony in itself requires the conclusion that they, too, were trying to get away with all of the property that they

could, with view of protecting the defrauding Newtons, who were members of their family identity.

Complaint is made against the Circuit Court of Appeals because of its conclusion that the proof was not sufficient to show that there were any profits in the three jobs. The court had first concluded that the contracts were not enforceable, but if enforceable, the court further held that the record was absent of proof to show the amount of the profits. Petitioner refers to the Wooten audit (R. R. 86). We have already shown to the court, from the record, that none of these contracts were completed on December 13, 1942. In fact, these were unfinished contracts when the Government took over on October 16, 1943; but the Wooten audit only covers the records of accounts "in the office of F. T. Newton" for the year ending December 31, 1942. These records were out of balance according to their witness Dumaine on cash items alone of more than $1,000,000.00, and the jobs were not completed during the period covered by the audit. The Wooten audit, therefore, constitutes no proof whatsoever.

Complaint is made about the holding of the Circuit Court of Appeals that Mrs. Edmonson joined with the Newtons to strip them of their property. We must first recognize that said court knew that the Newtons were guilty of fraud. They knew from the record that if they assumed the contracts to be binding, Mrs. Newton was not a party thereto, and she gave away all of the real estate just as did her husband. They also knew that these alleged contracts were not only in favor of J. B. Edmonson and Mrs. Edmonson, but these contracts were likewise in favor of four other members of the Newton family, namely, Phillip Newton, son of F. T. Newton, Carolyn Lewis Newton, daughter-in-law of Newton, T. E. Newton, father of Newton, and Reuben L. Newton, brother of Newton. These parties were all

identified in the Camp Campbell, Tennessee contract (R.R. 217). Their names were identified in the Greenville, Mississippi project, but haste evidently kept their signatures off the attempted contract (R.R. 221). Their names did not appear in the Rohwer, Arkansas project (R.R. 225). Approximately half of the alleged profits under the Wooten audit came from Clarksville, Tennessee, but the Newtons did not take care of the father, brother, son and daughter-in-law in the conveyance of real estate. The Edmonsons took all of the real estate, to the exclusion of the other parties to the contracts, according to their own admissions, and left out in the cold their fellow contractees, if their stories and contentions could prevail. And, if we believe the stories told, the Government Bonds owned by the Newtons were turned over to Reuben L. Newton, either directly or indirectly. At first, the bonds amounted to $15,500.00 (B.R. 601). Later the bonds were increased to $40,000.00, with Reuben L. Newton in possession thereof (R.R. 616-17). The story of Reuben L. Newton in connection therewith is a weird one. Mrs. Newton is said first to have returned to him $30,000.00 in money (R.R. 628). Subsequently, it developed that the Treasury Department of the United States had cashed bonds of maturity value of $44,425.00, and Mrs. Newton had received $38,029.25 in money (R.R. 99). They claim this money was carried by Reuben L. Newton to his home in Jasper, Alabama, where he practices law, and there, without the knowledge of his wife, he buried the money on his lawn, and it stayed there until it was dug up, according to Newton, after he had to tell his story in court (R.R. 632). Even that story is unworthy of belief; but if it were true, Phillip Newton and his wife failed to get their part of the money. They failed to get their part of the property. When the Newtons and Edmonsons needed a lawyer, they hired the Honorable T. J. Wills, with view of getting him to uphold the real estate transactions (B.R.

765). During all of this time, the Newtons had access to the Edmonsons' automobile (R.R. 465). The name of Edmonson was loaned to Newton to carry on the business of the Mississippi Electric Company, a trade name of the Newtons, used to violate Government regulations in that the Newtons would become the contractor and use their own trade name as basis for subcontract (R.R. 577). The record is full of these great inconsistencies, constituting wrongful conduct on behalf of the Edmonsons as they cooperated with the Newtons to try to defraud the creditors. No other conclusion could be reached than that reached by the Circuit Court of Appeals as to the fraud of the grantee. In view of all of the above, we contend that there is no reason or basis for sustaining petition for writ of certiorari.

In view of the fact that the petitioner seems to want to contend that there cannot be charged to Mrs. Edmonson any fraud, we hereafter present the affirmative position taken by us before the Circuit Court of Appeals.

IV

Affirmative Statement

As heretofore indicated, we respectfully submit that the statement of petitioner is such as to preclude this court from getting a comprehensive understanding of the questions involved; and the separate items discussed deal, not with the whole litigation as viewed by the Circuit Court of Appeals, but with isolated identities of facts which do not furnish measure used by courts generally in determining rights of the parties. In 1940, Newton and Glenn formed a partnership, and Newton began with his wife to receive two-thirds and Glenn one-third of the profits.

(1) The Newtons were to receive two-thirds of the profits because they were to furnish the finances.

(2) It was in July of 1941 when the Newtons instructed the accountant for the partnership to list all real estate of

both Mr. and Mrs. Newton as partnership assets, and to show F. T. Newton and Mrs. Newton as partners with a one-third interest each, and this was done, and the very real estate later deeded to Mrs. Edmonson was dedicated to payment of partnership debts, and this financial statement of the auditor was used to get credit (B.R. 243-4). Thereafter, income tax returns disclosed that the business operations carried on this division. The income tax return to the State of Mississippi for 1941 shows that the profits were divided into three parts (B.R. 879). The income tax returns for 1942 were handled in the same manner (B.R. 835). So when the alleged agreements were made between F. T. Newton and the Edmonsons and other members of the Newton family, there was a misstatement of facts, and Newton did not have a two-thirds interest, and there was a misstatement when it was provided until that the contract was necessary to assist Newton in acquiring additional capital, because Newton did not acquire one single penny of additional capital because thereof, but the partnership of Newton & Glenn, composed of the Newtons and Frank Glenn, got the necessary capital by executing notes and security. As hereinbefore stated, these agreements were primarily entered into for the purpose of avoiding income taxes. Therefore, these so-called agreements were void from the beginning, as the Circuit Court of Appeals recognized.

(3) The Circuit Court of Appeals accurately determined the facts, and clearly answered the questions involved. The court recognized that if the trustee would concede for the sake of argument that the agreements were legal and binding, still the conveyances were fraudulent and void. The court on appeal held that the Edmonsons did not and could not have any title to or interest in the profits until they were realized and actually paid over to them. Our opponents

challenged the correctness of this statement by the citation of authorities. The futility of these arguments and citations lies in the fact that said arguments and authorities have no application to the facts reflected by the record. Our opponents have failed to see and weigh and consider these pregnant facts.

(4) In 1942, when Newton and Glenn were carrying on the partnership business and constantly incurring new obligations, it did not lie within the power of Newton to withdraw any of his capital, as this silent arrangement with members of his family sought to do; and what he could not do directly, he could not do indirectly through the Edmonsons and other relatives.

(5) These alleged partnership agreements of the Newtons, even if valid, did not retard or restrict the partnership of Newton & Glenn in carrying on its business, and it was perfectly legal for Newton, Mrs. Newton or Glenn to assign or hypothecate the proceeds of any contract for operating capital. This is exactly what was done, and the monies were all assigned to the Union Planters National Bank & Trust Company, of Memphis, Tennessee, and there is still unpaid to said bank in excess of $1,000,000.00.

(6) And it should be pointed out that on March 1, 1943, Frank Glenn retired from the partnership, and Newton agreed to pay all the debts of the partnership, and Mrs. Newton guaranteed this obligation of her husband.

(7) About the 15th of March, 1943, R. G. Wooten, an expert tax attorney, was employed by the Newtons in connection with income tax returns. Wooten found that the Newton books were out of balance. He put two accountants to work, and it was not until August 15th of 1943 that he was able to get out any kind of statement.

(8) In answer to inquiry of R. G. Wooten, expert tax accountant and attorney representing the Newtons and the Edmonsons, he recognized that he could not know the rights of the parties, and he had to depend upon what he was told by the Newtons as to the rights of the parties. His testimony, of value here, is as follows:

"Q. Do you tell the Court and jury now when you made up the statement on August 15, 1943, that Mr. Newton was legally obligated to account to Mrs. Edmonson on a basis of profit of $200,582.84 in that contract?

"A. From what they told me, that is what they were entitled to. They were not supposed to be renegotiated. I didn't read all the contracts; I don't know what the contracts, except the rate, carried; I was too busy to go into a lot of detail other than there was a contract and rate of profit. As far as the whole thing was concerned, I knew nothing about it.

"Q. What do you mean by 'they' when you say 'they told you'?

"A. Mrs. Newton told me.

"Q. She delivered the contracts to you as tax accountant and attorney, and you prepared the income tax returns and prepared the statement for Mr. and Mrs. Edmonson on the basis of what Mrs. Newton told you?

"A. Edmonson and his wife were in there at the time when they told me; that is no more than a compilation made based upon what they claim; I don't know anything about it other than what the figures show.

"Q. You did not read the contract to see what they provided?

"A. No, except to see the ratio." (B. R. 1214).

"Q. You said you took the deductions on the income of Mrs. Newton and Mr. Newton on account of J. B. Edmonson of the sum of $2500.00, or a total of $5,000.00?

"A. That was based upon the two contracts.

"Q. On the basis of these contracts, Mrs. Newton did not owe any part of the $5,000.00, did she?

"A. No, that was put in these for the purpose of identifying those contracts.

"Q. Take the Camp Campbell contract, if Mr. Newton was due to pay Mr. Edmonson $5,000.00 on account of Camp Campbell contract, wasn't he due to pay five other people a like amount?

"A. Oh, yes; as I said to you, I am trying to be fair to you and the Court, too. There were several names there. I have my opinion, but that is an opinion and not a fact." (B. R. 1214-1215).

(9) As of August 14, 1943, F. T. Newton made individual income tax return to the State of Mississippi for the calendar year of 1942, and in that statement he valued the Edmonson contract at $5,000.00, and deducted one-half of the contract, or $2500.00, as an authorized deduction (B. R. 1113). Mrs. Newton's return is of like effect (B. R. 971). These particular returns were sworn to as aforesaid, on August 14, 1943, and just eight days later, or on August 23, 1943, the Newtons were executing the deeds to the Edmonsons, and claiming a greater amount due, now said to be $104,000.00. This testimony is, of course, unworthy of belief.

Fraud Chargeable to Mrs. Edmonson Alone Precludes Her Prevailing

We adopt the several affirmative positions taken by us in response to original petition for certiorari, and in addition thereto, add that every known badge of fraud came into existence in connection with the attempt to pass title to the property involved. The statutory and common law of Mississippi, here controlling, make this conclusion mandatory. In the first place, Mrs. Edmonson neither pleaded

nor proved that which was required of her under Section 67 (d) (6) of the Bankruptcy Act.

> "The burden was on the appellant, if it would save the transaction under said Section 67 (e), to prove that it was a purchaser in good faith and for a present fair consideration. . . . Appellant has failed to meet this burden." *Edward Hines Western Pine Co. v. First National Bank,* 61 Fed. 2d 503, (CCA Ill.).

The presumption is against petitioner, since there are involved members of her family.

> "The decision of this court in the Prosser case above cited is peculiarly applicable, in that in involved, as here, transactions between an insolvent debtor and members of his family, which are presumptively fraudulent, and call for full explanation on the part of the beneficiaries." *Bailey v. Blackmon,* (C.C.A. 4th), 3 Fed. 2d 252.

Where fraud is shown on part of grantor, burden shifts to grantee to show good faith and valuable consideration. The Newtons have been adjudged bankrupts on basis of their having fraudulently conveyed away this very property.

> "A debtor being unable to pay a debt when called upon by the creditor, a presumption arises that he could not have done so at any previous time, and any intervening conveyances of property is considered fraudulent and void, and it is incumbent on the party holding such property, and insisting upon such claim to show that such debtor, at the time of conveyance, retained other specific property, readily accessible, and ample for the discharge of all his debts, and this burden has not been met in this case." *Ames* v. *Dorroh,* 76 Miss. 187. See also *Richards* v. *Vaccaro,* 67 Miss. 516, 7 So. 516.

On question of debts and obligations and the time which must control as to when the Newtons became obligated to

the surety companies and banks and others having most of the claims, the case of *Ames* v. *Dorroh, supra,* settles the rule in Mississippi in favor of position that the ultimate result of the several contracts reaches back to the time when the contracts were made, and this means that subsequently accruing debts on contracts with surety companies and banks must be included:

> "It is a settled rule of law that the surety on a guardian, administration, or other fiducial obligation, is, in contemplation of the statute of frauds, a creditor of the principal in such bond from the date of its execution, though no default occurs until long afterwards. The liability, whenever happening, relates back to the date of the contract; and so it must be in this case, that C. B. Ames was a creditor of R. C. Patty for all sums of money subsequently paid by complainants for defaults of said Patty occurring after December 24, 1863, and before the first Monday of January, 1888."

Existing badges of fraud preclude recovery of property by Mrs. Edmonson.

> "On the issue as to whether there was a bona fide sale from Jos. V. Lavecchia to his sister-in-law, the following well-known labels and badges of fraud are disclosed by the evidence: Inadequacy of consideration, transaction not in usual course or mode of doing business, absolute conveyance as security, secrecy, insolvency of grantor, transfer of all his property, attempt to give evidence of fairness by conscripting sister-in-law as a conduit for passing title to the wife, retention of possession, failure to take a loss of the property covered by the conveyance which was commingled with some furniture and fixtures belonging to his father's estate, relationship of the parties, and transfer to person having no apparent use for the property." *Reed* v. *Lavecchia, et al.,* 193 So. 439, 187 Miss. 413.

The consideration was incorrectly identified. The deeds show consideration of ten dollars. The amount of debts

assumed, as identified in the deeds, is $33,230.00, and not $84,000.00. The revenue stamps would indicate a total consideration of $29,000.00.

> ". . . In the case of Magic City Coal & Feed Company *v.* Lewis, 164 Ky. 454, 175 S. W. 992, 993, we said: 'Fictitiousness of consideration and false statements and recitals as to consideration of a conveyance . . . 'The insolvency or considerable indebtedness of the grantor is a badge of fraud.' " *Howard et al.*, v. *First National Bank*, 110 S. W. 2d, 293, 296. See also *Reed* v. *Lavecchia, supra.*

This was an unusual transaction.

a. The Newtons were in a rush to get rid of the property.

b. The Edmonsons never saw the property and did not know of its location.

c. The Edmonsons did not know the value of any particular piece of property.

d. The Newtons retained office space and retained rents to October 15, and the United States District Judge found as a fact that the Newtons continued to collect rents after the deeds were delivered.

e. The deeds were kept in Newton's safe until date of recordation on October 6, 1943.

f. Two deeds were executed by Newton instead of one covering the same property.

g. All of the real property of the Newtons was conveyed to the sister of Mrs. Newton.

Badges of Fraud

a. These deeds were dated August 23, and were not recorded until October 6, 1943. See *Davis* v. *Cassels, et al.*, 220 Fed. 958 (Ala.), condemning this conduct.

b. The Newtons and Edmonsons were in undue haste, after obtaining the audit on or after August 15th, to obtain

deeds by August 23, 1943, if the deeds were then obtained. This secrecy and haste is a badge of fraud. Paragraph 86, 37 C. J. S. 926.

c. Insolvency or substantial indebtedness of grantor and conveyance of substantial of property, as was here done, is indication of fraud. *Michel* v. *American Fire & Casualty Co.* (C. C. A. 5th Cir.) 82 F. (2d) 583.

d. The conveyance here involved was a transfer of all real property other than the homestead of the Newtons, and for insolvent grantors this is a badge of fraud and is condemned by law. Paragraph 89, 37 C. J. S., 927.

e. Failure of the Edmonsons to produce evidence on the trial to support the conveyances is proof of fraud.

> "The presumption is that if they could have truthfully testified to facts showing the bona fides of the conveyance they would have done so." Paragraph 91, 37 C. J. S., 928. See also *Jones* v. *Jones*, 71 S. W. (2d) 999, 1004 (Ky.).

f. The Edmonsons failed to examine the property identified in the deeds and failed to take inventory of goods bought, and this is a badge of fraud. See *Varn Inv. Co.* v. *Bankers Trust Co.*, 141 S. E. 900 (Ga.), and *Chamberlain* v. *Dorrance*, 69 Ala. 40.

g. Mrs. F. T. Newton and Mrs. John B. Edmonson are sisters, and the presumption is in favor of creditors that conveyance by insolvent grantor is fraudulent.

> "The burden of overcoming this presumption is on the party claiming under the conveyance, contract, or gift." *Ham* v. *Ham*, 110 So. 583, 146 Miss. 161. See also *Bourn* v. *Bourn*, 140 So. 518, 163 Miss. 71, and *Watkins* v. *Martin*, 147 So. 652, 167 Miss. 343.

h. All of the transactions between the Newtons and Edmonsons before and after the delivery of the deeds were

void of any kind of writings or records, and all monies were handled in cash.

i. The grantors retained benefits to themselves after the execution and delivery of the deeds. The district judge found as a fact that the grantors continued to collect rents and retain same until the default of the Newtons on October 16, 1943 (R. R. 932). Under such cases where the grantors are under failing circumstances, no court will permit the conveyance to stand. The Supreme Court of the United States has followed the Supreme Court of Mississippi on this subject.

> "The law will not permit a debtor, in failing circumstances, to sell his land, convey it by deed, without reservations, and yet secretly reserve to himself the right to possess and occupy it for a limited time, for his own benefit. Wooten *v.* Clark, 23 Miss. 75; Arthur *v.* Com & R. R. Bk., 9 Sm. & M. 394; Towle *v.* Hoit, 14 N. H., 61; Paul *v.* Crooker, 8 N. H. 288; Smith *v.* Lowell, 6 N. H., 67. Such a transfer may be upon a valuable consideration, but it lacks the element of good faith; for while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor, at the expense of those he owes. A trust, thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right—the right of possession—and gives to the debtor the beneficial enjoyment of what rightfully belong to his creditors." *Lukins* v. *Aird*, 18 Law Ed., 750. See also *Dent* v. *Ferguson*, 33 Law Ed., 242, and *Benedict* v. *Ratner*, 69 Law Ed., 991.

There are many other badges of fraud, including inadequacy of consideration, false statements made respecting ownership of property, no evidence of acquittance of any debt, conflicts of statements of material facts by the several parties, alterations appearing in the deeds as to dates,

failure of the grantee to pay taxes on the property, the placing of other valuable property beyond the reach of creditors, including the bond transaction, which placed the Government Bonds of the Newtons in the hands of Newton's father and brother, failure to notify tenants of the alleged change of ownership, failure to notify insurance agents of the change in ownership until November 1, 1943, and the fact that the Newtons and Edmonsons are constantly together in and out of court.

Conclusion

In view of all of the above, the amended petition for writ of certiorari should be denied. The Circuit Court of Appeals for the Fifth Circuit has committed no error. It could not have reached any other conclusion than the one reached, and its judgment should not be further inquired into.

Respectfully submitted,

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Certificate

The undersigned, of attorneys for G. M. McWilliams, Trustee in Bankruptcy of F. T. Newton and Mrs. F. T. Newton, Bankrupts, and respondent in Cause Number 287 in this Court, and here involved, hereby certifies that he has mailed to the Honorable Horace C. Wilkinson, of Birmingham, Alabama, postage prepaid, a copy of the foregoing response and brief, and that he has delivered to the Honorable T. J. Wills, attorney for petitioner, a copy of same, on this 20th day of November, A. D., 1947.

M. M. ROBERTS,
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